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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

MICHAEL JACKSON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may grant habeas corpus relief, to a State prisoner on a Sixth Amendment claim of ineffective assistance of counsel, based solely on the absence of expert "medical" opinion and "social history" evidence at the sentencing phase of the prisoner's capital trial, (a) without regard to a "contemporary assessment" of the circumstances faced by trial counsel and (b) without proof that the evidence actually existed at the time of trial and was favorable to the defense.

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IN THE SUPREME COURT OF THE UNITED STATES

NO.

JEANNE WOODFORD, Warden, *Petitioner,*

v.

MICHAEL JACKSON, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

Jeanne Woodford, Warden of the California State Prison at San Quentin, petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit, which granted respondent Michael Jackson federal habeas corpus relief from the sentence of death, handed down in his state criminal trial, for the murder of a police officer.

OPINIONS BELOW

The opinion of the Court of Appeals is published as *Jackson v. Calderon*, 211 F.3d 1148 (9th Cir. 2000), and is reproduced as Appendix A to this petition. The opinion of the district court is reproduced as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was filed on May 8, 2000, and the parties' petitions for rehearing and hearing en banc were denied on July 19, 2000. This petition follows within 90 days, and is therefore timely. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1, 13.4. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment of the United States Constitution provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Section 2254 of Title 28 of the United States Code provides, in pertinent part, that: "a district court shall entertain a petition for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

1. The Crime.

Respondent Michael Jackson shot and killed a young policeman, Officer Kenneth Wrede, during a violent street confrontation in West Covina, California, in August 1983. The confrontation began when Officer Wrede approached Jackson after several onlookers had reported Jackson behaving very strangely—jumping and diving and yelling—on the sidewalks of the residential neighborhood. It escalated when Jackson physically attacked the officer, kicking and punching him and wrestling him to the ground. It became critical minutes later in a deadly cat-and-mouse game, played out on each side of a police patrol car, with Officer Wrede pointing his revolver at Jackson and Jackson pointing the policeman's own shotgun, wrenched from the patrol car by Jackson, at the officer. It ended tragically when—after Jackson had seemingly relented by laying down the shotgun and resting his head on the roof of the patrol car—he suddenly raised the shotgun, fired, and shot Officer Wrede dead. In the denouement, other police officers arrived, moments too late, and subdued and arrested Jackson in

another struggle, but only after he had threatened to kill them with the shotgun and only after he had been bitten and disarmed by an attacking police dog.

2. The State Criminal Proceedings.

The State prosecuted Jackson for premeditated and deliberate first-degree murder of a peace officer engaged in his duties, a capital offense. At his trial, Jackson never denied he was the killer; instead, he testified that he had smoked phencyclidine (PCP) shortly before the crime and that he had no recollection of the homicide. He defended on grounds that, as shown by his PCP intoxication and his bizarre conduct immediately before and after the homicide, his mental ability had been so impaired that he had neither premeditated nor intended to kill. In this effort, he was aided by post-arrest medical records showing, among other things, a high level of PCP in Jackson's bloodstream, and the testimony of hospital nurses and a doctor who had observed and treated him after his arrest. In addition, the defense presented the opinion of an expert on PCP, psychiatrist Orm Aniline. He testified about the general effects of PCP on consciousness, including that of amnesia. He further testified, in light of the particular evidence in the case, about the effects PCP would have exerted on someone who had ingested as much as Jackson had, and who behaved like Jackson, on the day of the murder. The prosecution pointed to Jackson's objective conduct and statements at the time of the crime as manifesting his ability to think clearly and purposefully, and countered the claim of memory loss with evidence that Jackson, in the hours and days following the crime, had made statements that inadvertently betrayed his own actual recollection of the events of the crime. The jury found Jackson guilty as charged.

At the penalty phase of the trial, the prosecution introduced further "aggravating" evidence, beyond that inherent

in the guilt-phase evidence of the crime, that Jackson had committed forcible sodomy while in the Army, that he previously had assaulted another policeman, and that he had suffered a prior felony conviction for burglary. The defense also produced further "mitigating" testimony, beyond the guilt-phase medical and mental-state evidence, from Jackson's mother and his wife. Jackson's mother testified that Jackson's "hustler" father had been absent and indifferent, that Jackson had given her no problems in school, that he was an introvert whose troubles began with glue-sniffing, that he had tried to right himself by joining the Army, that he was "sick" with drug use, and that she felt she had failed him in raising him in a large and unwieldy household with her many stepchildren. Jackson's wife testified that, although they had separated because of his drug problems, Jackson was a good person, a nice husband, unselfish, and a loving father to their children. The judge instructed the sentencing jury to consider all the evidence, including that adduced at the guilt phase of the trial, and the arguments of counsel; and defense counsel argued to the jury that, among other factors, Jackson's PCP use and intoxication were "mitigating" circumstances. The jury returned a death-penalty verdict.

The California Supreme Court affirmed Jackson's conviction and sentence on appeal in December 1989. This Court denied Jackson's petition for certiorari. 498 U.S. 881 (1990).

3. The Habeas Corpus Proceedings.

The federal district court appointed new counsel for Jackson in February 1992. More than a year later, in March 1993, Jackson filed a federal petition for a writ of habeas corpus, alleging among other things that Jackson's defense lawyer in numerous ways had rendered unconstitutionally ineffective assistance in both the guilt and penalty phases of the

state-court trial. The district court determined that those claims, and others, had not first been presented and "exhausted" in the State court. So, in August 1993, Jackson presented those ineffective-counsel claims to the California Supreme Court for the first time. In 1995, the State court rejected the claims, both "on the merits," and also on the express ground that the presentation of those claims in state court had been "untimely." This Court denied Jackson's petition for certiorari. 516 U.S. 965 (1995).

Upon re-initiation of federal proceedings in 1995, the district court rejected the State's argument that, given the state-court procedural ruling, the ineffective-counsel claims were barred from federal review. The district court held an evidentiary hearing on the ineffective-counsel claims, and on Jackson's claim that new, post-trial scientific developments now demonstrated that his PCP intoxication had been so severe as to render him actually "innocent" of the murder on mens rea grounds. Just prior to the 1996 hearing, Jackson proffered a package of seventeen written declarations that had never been presented to the State court. Included were many declarations, purportedly from family members and acquaintances, recounting certain alleged events in Jackson's upbringing and asserting that the declarants had been ready and available to testify about them in the criminal trial. Also included was a declaration from a psychologist, Jay Jackman, opining about Jackson's mental health in light of his review of the other declarations and other alleged records. Upon the Warden's objection to the admissibility of the declarations, Jackson's federal counsel expressly agreed, and the district court explicitly ruled, that they would not be admitted for the truth of the matters asserted therein on the issue of ineffective-counsel "prejudice." (App. B100-101 & fn. 37; App. F5-12.)

In 1997, after the nine-day hearing, the district court denied relief entirely. Rejecting the claim of ineffective counsel at sentencing, the court found that, with respect to the

issue of Jackson's background, "Jackson has given this court no evidence that other family members possessed favorable evidence that Jackson's mother and wife could not have supplied," and that Jackson himself did not provide counsel with additional information when consulted about it. (App. B98-99.) In making these findings, the court reaffirmed that the proffered declarations had been admitted at the federal hearing only for limited purposes and not for the truth of the matters asserted therein. (*Id.* at B100-101 & fn. 37.) The district court further ruled that evidence that Jackson's mother had severely choked him while disciplining him, although not presented to the penalty jury, was "not of the magnitude that it would have resulted in a different verdict in the penalty phase." (*Id.* at B101.)

With respect to penalty-phase evidence of Jackson's mental condition, the district court found that the defense's own retained psychiatrists had reported to counsel that Jackson "showed no signs of major mental illness." (*Id.* at B105.) The court noted that, at the hearing, Jackson had presented no evidence that would have changed those reports. Further, the court concluded that counsel was not required to undertake other physical and mental testing never recommended by any of the three defense psychiatrists. (*Id.* at B13-15, B106.)

4. The Ninth Circuit Appeal.

Jackson appealed. The Ninth Circuit heard oral argument in October 1998 and issued its opinion nineteen months later, in May 2000. The panel unanimously affirmed the denial of relief on Jackson's claims that new scientific advances prove his innocence and that he suffered from ineffective counsel at the guilt phase of his trial. Among other things, the panel specifically validated defense counsel's decision to rely, at the guilt phase, on the testimony of psychiatrist Aniline about the potential effects PCP exerted on

Jackson in light of the eyewitness and medical-record evidence of his behavior and condition at the time of the crime, even though Dr. Aniline had not personally interviewed Jackson. Conversely, the panel validated counsel's decision to forgo testimony from another psychiatrist, Dr. John Mead, even though he had in fact interviewed Jackson prior to trial. The panel explained that Dr. Mead's testimony would have been a risky "mixed bag." Further, the panel recognized, Dr. Mead's opinions about Jackson's intoxication and claimed memory loss, views gleaned from the doctor's testimony outside the jury's presence at trial, were not significant enough to have affected the guilt phase. The panel concluded that, because the doctor had not testified at the federal hearing, "there is no basis for concluding that Dr. Mead would have been more helpful." (App. A [Slip Op.], 4999.)

But, in a 2-to-1 portion of opinion, the panel reversed the district court and ordered relief from the death sentence on the claim of ineffective counsel at the penalty hearing. Notwithstanding the guilt-phase evidence, the majority opinion of Judges Canby and Thomas concluded that no expert "medical" mental-state evidence had been submitted to the jurors at sentencing. (App. A [Slip Op.], 5007-10.) In the majority's view, such evidence should have included, for one thing, the same opinion testimony from Dr. Mead about Jackson's intoxication and memory that the panel had deemed insignificant with respect to the guilt phase, plus an alleged further opinion that Jackson had not "premeditated" the killing. *(Id.* at 5000, 5008.) Also, the majority indicated, counsel should have undertaken certain mental and physical examinations of Jackson that—in a view the majority ascribed to Dr. Aniline in the federal proceedings—"could" have shown "to a 90% certainty" that "Jackson was unable to think consciously at the time of the crime." (*Id.* at 5002, 5009-10.) In addition, the majority stated, counsel should have produced other asserted evidence that Jackson had been diagnosed as

"schizophrenic" and had been "addicted" to PCP. (*Id.* at 5007, 5009.)

The panel majority also condemned counsel's failure to present "social history" evidence about alleged abuse and neglect in Jackson's childhood. The majority located this evidence, first, in the package of declarations the district court had ruled inadmissible for their hearsay value. (App. A [Slip Op.], 5007, 5010.) Second, the majority located such evidence in the federal deposition testimony of Jackson's mother, in which she stated that she sometimes had choked Jackson when disciplining him. (*Id.* at 5010.) Acknowledging only the factor of premeditation as aggravating—and not the murder of a policeman—the panel majority concluded that there was a reasonable probability counsel's incompetence had determined the sentencing decision. (*Id.* at 5010-11.)

In dissent, Judge O'Scannlain concluded that Jackson's showing was insufficient. The dissenting opinion found "troubling" the fact the State had never had an opportunity to cross-examine the social-history declarants. But it found absolutely "stunning" the majority's reliance upon the absence of the choking evidence, concluding that it was not sufficiently serious, that the evidence could well have hindered the defense, and that trial counsel should not be faulted for its omission given his attempts to obtain such information from Jackson himself. As for the mental-health evidence, the dissent concluded that counsel had reasonably relied on the reports of the defense psychiatrists, and that the alleged evidence of mental illness was too weak. With respect to medical opinion evidence of Jackson's mental state at the time of the crime, the dissent pointed out that the jury had received much evidence of this type at the guilt phase and that, in light of the strength of the evidence of premeditation and the fact that the jury sentenced Jackson to death despite all of the defense's mental-state evidence, the further evidence cited by the majority did

not establish a "reasonable probability" that the result would have been different. (App. A [Slip Op.], 5014-21.)

The Warden's petition for rehearing and hearing en banc was denied on July 19, 2000. (App. C.) On July 28, the Ninth Circuit stayed the issuance of the mandate for 90 days to allow for the filing of this petition for writ of certiorari. (App. D.)

REASONS FOR GRANTING THE WRIT

The Ninth Circuit departed from the accepted and usual course of judicial proceedings and granted relief under a per se rule of presumed attorney incompetence and prejudice, contrary to this Court's *Strickland v. Washington* precedents.

A. Introduction and Summary of Argument.

Strickland v. Washington, 466 U.S. 668 (1984), sets out this Court's clearly established rule governing claims of unconstitutional ineffectiveness of counsel under the Sixth Amendment. *Williams v. Taylor*, 120 S.Ct. 1495, 1512 (2000). *Strickland* requires the claimant to make two separate, affirmative showings in challenging a death sentence. One, he must show that, in light of a "contemporary assessment" of all the circumstances, counsel's performance was unreasonable under prevailing professional norms. 486 U.S. at 688; *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Two, he must show a "reasonable probability"—not "reasonable possibility"—that, but for counsel's deficient performance, the sentencing decision would have been different. *Id.* at 695; see *Strickler v. Green*, 527 U.S. 263, 291 (1999). Here, however, the Ninth Circuit transformed an unremarkable admonition stressing the importance of mitigating evidence—"it is imperative that all relevant mitigating information be unearthed for consideration in the capital sentencing phase," *Caro v. Calderon*, 165 F.3d

1223, 1227 (9th Cir. 1999), cert. den. 527 U.S. 1049 (1999)—into a simplistic substitute for the *Strickland* test. In concluding that Jackson's counsel had unconstitutionally failed to produce "medical" and "social history" evidence, the Ninth Circuit traveled a scorched-earth march of destruction over this Court's ineffective-counsel jurisprudence.

• The panel majority insisted, first, that no medical mental-state evidence had been presented in the capital sentencing phase—even though the sentencing jurors had heard and were instructed to consider extensive guilt-phase defense evidence devoted exclusively to the issue of mental-state, including testimony from Jackson's hospital physician and nurses, and expert opinion testimony from a psychiatrist on the likely mental effects of PCP on someone in Jackson's precise circumstances.

• The majority deemed counsel unreasonable for not undertaking certain physical and mental examinations of his client, even though none of the three psychiatrists he consulted ever recommended such examinations; then, the panel assumed without any proof that the tests would have produced favorable mitigation evidence for the penalty phase of Jackson's capital trial.

• The majority condemned trial counsel for failing to produce certain evidence of Jackson's family life from his mother and other family members and acquaintances, even though counsel sought such information, without success, from Jackson's mother, from his wife, and from Jackson himself.

• It found a "reasonable probability" of prejudice in counsel's decision to forgo, at the sentencing hearing, an expert's opinion testimony that Jackson had not premeditated, even though the jury already had found premeditation beyond a reasonable doubt at the guilt trial and even though Jackson in the federal habeas corpus proceedings never produced the expert to testify whether he in fact had held such an opinion.

• It found "prejudicial" counsel's failure to produce evidence that Jackson was "addicted" to PCP and had been diagnosed as "schizophrenic," even though Jackson in federal court never produced any doctor's testimony that he suffered from such conditions, and even though the three psychiatrists whom counsel consulted never intimated that Jackson was mentally ill.

• And it found "prejudicial" counsel's failure to produce at trial factual information described ten years later in hearsay declarations that the district court, with Jackson's express agreement, had excluded from evidence for such purposes in the federal hearing.

In effect, the Ninth Circuit relieved Jackson of both the burden of showing "deficient performance" and the burden of showing a "reasonable probability of prejudice." Instead, the panel majority in effect applied a rigid new penalty-phase rule, absolutely requiring medical and social history evidence, that made no "contemporary assessment" of the actual circumstances confronting counsel, including lack of cooperation from the client, the palpable risk that ostensibly mitigating evidence would backfire on the defense, and the advice of experts. Then, the majority merely assumed without proof that favorable evidence sufficient to show a "reasonable probability" of prejudice actually had existed at the time of the penalty trial. The decision, in essence, proceeds as if there were a special penalty-phase *Strickland* rule that would retroactively invalidate death sentences whenever later federal habeas corpus counsel uncovers, or merely alleges the prior existence of, further potentially mitigating evidence. The Circuit's violation of the true *Strickland* rule warrants issuance of the writ of certiorari.

B. The Ninth Circuit applied an improper per se rule of deficient performance and prejudice.

Review of the five-page analysis of the majority on this point (App. A [Slip Op.], 5007-5011) shows it to be rife with numerous demonstrable errors and departures from normal judicial proceedings, and confirms that its ultimate conclusion is indistinguishable upon a rigid and novel rule of per se ineffective-counsel contrary to the *Strickland* rule.

1. Medical mental-state evidence.

(a). *Deficient performance.*

On the question of Jackson's mental health and mental condition at the time of the crime, the majority repeatedly stated that "the defense presented no medical testimony during the penalty phase," that "the penalty phase was left without any expert evidence at all concerning one of the most important factors in mitigation–Jackson's clearly impaired medical condition at the time of the crime," that there had been "an utter failure to present medical evidence," and that the jury had "no picture at all" regarding Jackson's state of consciousness. (App. A [Slip Op.], 5007-9.) In fact, however, the penalty phase jurors had heard, and the trial judge instructed them to consider on the question of penalty, guilt-phase evidence that included eyewitness testimony about Jackson's intoxication and bizarre conduct, defense testimony from Jackson's hospital doctor and nurses, opinion evidence from the defense's PCP expert, Dr. Aniline, and the testimony of Jackson himself. The jurors also heard, and were instructed to consider, defense counsel's mitigation argument based on such evidence. (RT 1628-9, 1641, 1645-7, 1650-1; see Cal. Pen. Code, § 190.3(h).) The panel majority's conclusion that there had been an "utter failure" to present medical mental-state evidence is

demonstrably unfounded, and would require that counsel must duplicate his efforts and present guilt-phase "medical" evidence all over again at the penalty-phase.

Next, departing from their own conclusion crediting counsel's similar decision in the guilt phase, the 2-to-1 majority condemned counsel's decision to forgo testimony from Dr. Mead at the penalty phase. The majority explained that counsel had culpably eschewed this evidence even though he "could not identify harmful material that was not already available to the prosecution." (App. A [Slip Op.], 5008.) In fact, however, Dr. Mead's written report to trial counsel indeed contained a harmful opinion that "any psychiatric diagnosis would have been within the realm of character pathology" (Vol. 4, 9th Cir. Supp. Excerpts of Record [ER]1467; Vol. 9 ER 2565), a risky opinion that well might have suggested to the jury that Jackson was simply evil rather than the victim of a true mental illness. See *Hernandez v. Johnson*, 108 F.3d 554, 562 n. 10 (5th Cir. 1997). Not even Jackson's "*Strickland* expert" at the federal hearing disputed that risk. (6 Supp. ER 1431-2). Jackson never even alleged, and certainly produced no evidence in federal court, that the prosecution at the penalty phase somehow had become aware of the counter-productive opinion held by Dr. Mead. Despite the *Strickland* rule of "contemporary assessment," the panel majority totally discounted this circumstance confronting trial counsel.

The majority further asserted that "counsel did not compensate for his failure to call Dr. Mead at the penalty phase by having Dr. Aniline examine Jackson so that he could testify in mitigation." (App. A [Slip Op.], 5008-9.) Of course, as already noted, the appellate panel itself earlier had approved counsel's guilt phase performance with respect to the use of both of these medical experts as sound. Regardless—and consonant with the district court's unchallenged finding of fact on this precise point—Dr. Aniline never suggested such an interview, even though defense counsel specifically asked for

the doctor's opinion on whether one should be undertaken. (App. B27-28.) Once more, the panel majority's opinion ignored the actual circumstances confronting trial counsel at the time of trial: the lawyer's lack of psychiatric expertise and his consequent understandable dependence upon the advice of his medical consultants.

Next, given that they ultimately seemed to categorize the alleged lapse as "prejudicial" (App. A [Slip Op.], 5008-10), the majority implicitly faulted trial counsel for not subjecting Jackson to other physical and mental examinations after counsel's appointment to the case twelve days after the crime. But, as the district court found on uncontroverted evidence and without contradiction by the panel majority, neither Dr. Aniline nor the other defense psychiatrists ever suggested to counsel at the time that such tests might prove useful to the defense at trial, even though counsel had asked Dr. Aniline for his "observations . . . as soon as possible." (App. B14-15.) To treat counsel's performance in this regard as deficient is tantamount to imposing a *Strickland* rule that would require the lawyer to be a psychiatrist himself and also require him to perform the cited tests in all case automatically.

Finally, the majority said that counsel was remiss in not producing medical evidence of Jackson's alleged prior diagnosis as a "schizophrenic" and his alleged "addiction" to PCP. (App. A [Slip Op.] 5007, 5009.) But—even if it were assumed that "evidence" of an actual medical diagnosis of schizophrenia truly could be found in Jackson's exhibit showing merely that an individual with a master's degree had ambiguously suggested "latent" schizophrenic qualities (see p. 17, infra)—defense counsel still was confronted with the obvious weakness and danger of such evidence in light of his own defense psychiatrist reports that petitioner, in the end, in fact suffered from no mental illnesses. Similarly, even if there were evidence of "addiction"—and there was none (see p. 17, infra)—the evidence before the sentencing jury already had

recounted Jackson's chronic drug abuse anyway. (State Rep.'s Tr. 1096-1100, 1110, 12-19-1220, 1238-9, 1311.)

(b). *Prejudice.*

The majority ultimately found counsel's performance with respect to the expert medical evidence "prejudicial." (App. A [Slip Op.] 5009.) In explaining why, the majority intimated, first, that Dr. Mead somehow would have rendered an "opinion that Jackson in fact had not premeditated." (*Id.* at 5000, 5008.) But—even if it were assumed that such opinion evidence could even play a legitimate role in the penalty phase in light of the jury's contrary findings on the mental elements of premeditated and deliberate first-degree murder in the guilt phase, see *Franklin v. Lynaugh*, 484 U.S. 164, 174 (1988) [1]/—there is no evidence that the doctor in fact had harbored such an opinion. Certainly, Jackson never produced Dr. Mead to testify in federal court that he had held that opinion. Indeed, in its own validation of counsel's decision not to call Dr. Mead

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[1] As explained in the plurality opinion, with support from the concurring opinion, in *Franklin*:

> [this Court's] edict that, in a capital case, "'the sentencer . . . [may] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense'"[citations omitted] in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor."

484 U.S. at 174; accord, *id.* at 187-8 (conc. op.). It is hard to see how failure to produce such constitutionally insignificant evidence could implicate either "prong" of the *Strickland* test.

as a guilt-phase witness, the majority earlier had recognized explicitly that, in light of Jackson's failure to produce the doctor at the federal hearing, any further conclusions about his value, beyond some opinions given in state-court testimony about intoxication and memory-loss, were impossible. (App. A [Slip Op.], 4999.)[2]/ Yet the majority relied on mere speculation of that same sort in characterizing the absence of the same doctor's testimony at the penalty phase as "prejudicial" under *Strickland*.

Abruptly shifting its focus away from mitigation testimony that allegedly might have been provided by Dr. Mead, the majority in its next breath announced a quite different conclusion: that, anyway, counsel should have called Dr. Aniline, whose expert opinion in federal court had "indicated the kind of testimony available" to the defense at the time of trial. (App. A [Slip Op.], 5010.) The majority refers, it appears, to Dr. Aniline's federal-court testimony about whether certain neurological and other examinations *"could"* have determined Jackson's "lack of capacity" or unconsciousness to a "90% degree of certainty at the time of

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[2] Those opinions were unremarkable and were not even cited by the majority opinion in granting habeas corpus relief to Jackson. Dr. Mead's pre-trial report opined that Jackson had been sane, that he had been "grossly intoxicated," and that he recalled "little" about the murder. The doctor's opinion on Jackson's intoxication was cumulative of the abundant guilt phase evidence and the prosecution's explicit concession at trial on the issue of intoxication. (RT 456-9, 468-72, 588-9, 918-20, 954-956, 1006-7, 1059, 1082, 1173-5, 1421.) And, as the majority recognized in its discussion of counsel's guilt-phase performance, Dr. Mead's mere assertion about Jackson's memory loss would have been insignificant too. (App. A [Slip Op.], 4999.) Jackson himself testified fully at trial about lack of memory. And there is no reason to conclude that Dr. Mead somehow was an "expert" on whether petitioner was telling the truth anyway. To the contrary, further evidence adduced at the federal hearing indicated that Dr. Mead had been dubious of the broad scope of Jackson's claimed memory loss. (4 Supp. ER 1106-7; 6 Supp. ER 1368-70.)

Jackson's trial." (*Id.* at 5002 & n. 2, 5010.) But Dr. Aniline never asserted, or even purported to assert, that the omitted tests actually *would* have produced such favorable evidence. Otherwise, the source of the favorable evidence showing the "certainty" would be Dr. Aniline himself, not the vaunted tests; and, consonant with his trial testimony and as the district court recognized, Dr. Aniline acknowledged at the federal hearing that he had not been certain back at the time of the criminal trial. (App. B28.) In fact, Dr. Aniline's speculation in his federal-court testimony expressed merely the truism that, *if* certain physical and mental tests had been performed on Jackson soon after the crime, *then*, depending on the results, it might have been possible to evaluate them to see whether they would establish an unconsciousness type of defense with any certainty. (App. G [Aniline Testimony].)[3] As neither Dr. Aniline nor the other defense psychiatrists ever suggested the

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[3] As the district court correctly found,

> Jackson has not demonstrated that if Dr. Aniline had requested and obtained an interview of Jackson that he could have testified to a 90 percent degree of certainty in 1984 that Jackson could not have the requisite mental state necessary for a first degree murder conviction. . . . . Rather Dr. Aniline stated that *if* psychological-neurological tests had been done [emphasis in original], in conjunction with repeated blood tests and urinalysis tests, Jackson's mental state could have been *rigorously evaluated.* [Emphasis added.] Dr. Aniline did not recommend that these tests be done at the time he was consulted, apparently since it was some four months after the incident, nor did he recommend any other tests such as the adipose tissue removal procedure, which in conjunction with a battery of psychiatric tests, could have been conducted even several months after the incident to show the validity of Jackson's amnestic condition at the time of the shooting. . . . Moreover, Dr. Aniline actually clarified his testimony in the evidentiary hearing, stating that in 1984 he was not ninety percent certain that Jackson could not harbor the mental state for first degree murder. (App. B28.)

tests, the examinations were never undertaken; so there were no results to support any such expert opinion at the time of trial or at the federal hearing. The majority's citation to Dr. Aniline's circular statement—at most merely an expert's unfounded "ipse dixit" see *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 157 (1999), or immaterial "lingering doubt" evidence contradicting the jury's own findings on premeditation and deliberation, see *Franklin*, 487 U.S. at 174—wholly begs the question of whether the tests actually would have produced evidence favorable to the defense. Instead, the panel majority again simply assumed actual favorable results.

Finally, the majority alluded to alleged evidence of Jackson's PCP "addiction" and diagnosis of "schizophrenia." (App. A [Slip Op.], 5007, 5009.) But, as with the other medical "evidence" assumed by the majority, this cited evidence exists nowhere in the record. No medical expert, in either state or federal court, ever testified that Jackson was "addicted" to PCP.[4]/ Similarly, no doctor ever testified that Jackson at any time suffered from schizophrenia.[5]/ To the contrary, psychiatrists consulted by defense counsel opined that Jackson

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[4] In the appellate court, Jackson cited the "social history" declarations as the source of such "evidence." But, as explained in the next section of this brief, those declarations had been excluded for their truth on the issue of *Strickland* prejudice.

[5] A 1970 probation department report, hand signed by a "staff psychologist" with the designation of "M.A.," asserted that the then-16 year-old Jackson's verbal responses "suggested peculiar associations suggestive of schizophrenia rather than borderline intelligence," that "a sample of his oral reading indicated a normal phonics development approach, with poor comprehension of even simple material, suggesting schizophrenic twisting of content," that "projectives confirmed the suspected schizophrenic thinking processes," and that, "if this continues, one will expect him to develop stronger schizophrenic tendencies." These observations, apparently, formed the basis of the report's "diagnostic impression" of "latent" schizophrenia. (Exh. 293.)

suffered from no mental illness. (App. B105.) Again, the Ninth Circuit simply assumed that favorable medical evidence existed and had been available to counsel.

2. "Social history" evidence.

(a). *Deficient performance.*

The court of appeals' 2-to-1 opinion also deemed deficient trial counsel's performance in not presenting a "social history" of Jackson. The majority noted that Jackson had presented the testimony of a well-known criminal defense lawyer claiming that a capital defense lawyer should prepare and present a "social history." (App. A [Slip Op.], 5007.) The expert's bare opinion, however, was not supported by any evidence that such in fact was the "prevailing professional norm" in 1983-84. And the "expert" acknowledged that she had no idea how much effort, time, or money had been required to produce the "social history" package of written declarations proffered, for a limited purpose, by Jackson's new counsel in the federal proceedings more than a decade after the criminal trial.

The Ninth Circuit cited this evidence, even though the district court had found: that trial counsel had consulted Jackson, who proved not to be "a source of mitigating evidence"; that counsel had interviewed Jackson's ex-wife and his mother; and that there was "no evidence that other family members possessed favorable evidence that Jackson's mother and wife could not have supplied." (App. B97-99.) The Circuit's approach would hold counsel responsible if his client or prospective witness are not forthcoming in pre-trial interviews. Such a view cannot be reconciled with *Strickland,* which recognizes that counsel's mitigation investigation may be circumscribed depending upon the information he receives from his client. 466 U.S. at 691.

(b). *Prejudice.*

The panel majority identified the package of "social history" declarations as evidence that trial counsel "could and should have" presented at Jackson's sentencing hearing. (App. A [Slip Op.], 5009.) And, it is true, the majority acknowledged—albeit without saying that it made any difference—that the State had not been afforded an opportunity to cross-examine one of the declarants, psychologist Jackman. (*Id.* at 5010.) But the majority totally ignored the fact that *none* of the "social history" declarations—comprising alleged accounts of Jackson's family and upbringing and the alleged declarants' averments that they really would have been available and willing to testify at trial in the manner described in the writings—had even been presented to the State court or had even been offered into evidence in federal court for the truth of the assertions contained therein. Nor, in any event, were the declarations admitted for their truth. Instead, in an unchallenged ruling, the district judge limited their admissibility as hearsay and explained that Jackson would have to produce the declarants for cross-examination if he wanted to rely on them to show prejudice from counsel's alleged incompetence. (App. B100-1 & n. 37.)

The district court's evidentiary ruling had two profound effects on the case. One, it mooted out any need—and any incentive or opportunity—for the State to further object to the material as beyond the scope of any "exhausted" claim or any claim in the federal petition, or to seek to test the truth of the "social history," to illuminate how the witnesses would have fared at trial under cross-examination, or to explore how far a trial attorney would have had to explore in relation to the "prevailing professional norm" in order to obtain it.[6]/ Two,

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[6] After the evidentiary ruling, Jackson filed a Notice that he would not call the declarants as witnesses in the hearing. (USDC Docket No. 210.)

and even more important, Jackson's decision to decline to produce the witnesses in light of the evidentiary ruling resulted in a complete failure of proof that the proffered social history evidence really "should and could" have been discovered and produced with the resources available to defense counsel at trial.

The majority, perhaps mindful of the evidentiary flaw in the social history declarations, asserted at last that federal deposition testimony from Jackson's mother, to the effect that she had choked her son severely on a number of occasions in the course of disciplining him as a youth, "alone" or in conjunction with the allegedly omitted medical would have presented a "very different picture from her testimony at the penalty phase." (App. A [Slip Op.], 5010.) Of course, as explained above, the alleged medical evidence cited by the majority was insignificant and not cognizable in the federal proceedings. In addition, as explained by the dissenting judge, use of the evidence of the choking incidents would have been counter-productive at the penalty phase, for it would have made less certain any jury sympathy for Jackson's mother as a maternal figure; and it would have suggested incorrigibility in Jackson himself. In any event, as the dissent astutely recognized, it would have been a "stunning" misapplication of the constitutional test for ineffective counsel if the majority had premised relief on such omitted evidence "alone." (*Id.* at 5016.)

C. Relief on the majority's terms departed from traditional practice and seriously perverted the *Strickland* rule.

The Ninth Circuit has repeatedly insisted that "[i]t is *imperative* that *all* relevant mitigating information be unearthed for consideration in the capital sentencing phase." *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999), cert. den. 120 S.Ct. 1495 (2000) [*emphasis added*]; *Caro v. Calderon*, 165

F.3d at 1227. Here, the Circuit's substituted that robotic demand for this Court's sensible *Strickland* inquiry. The rationale for the result in this case reduces down to the following rule: in a capital case, relief from the sentence will be granted if the defense lawyer did not present to the sentencer "social history" evidence or (if mental state was at issue) expert "medical" evidence unearthed in a subsequent federal habeas corpus petition. It makes no difference in the Ninth Circuit's analysis whether defense counsel relied on retained experts for his tactics, whether the newly-alleged mitigating evidence also presented a counter-balancing risk of harm to the client's cause, or whether the client cooperated in identifying mitigating evidence about his own background and experiences. Nor, in the end, does it even matter whether the habeas corpus petitioner proves that the asserted evidence in fact would have been "mitigating" and in fact would have been available to competent counsel at the time of trial. It is simply "imperative" that it "all" be produced, and that's it.

All of this runs counter to *Strickland* and this Court's ineffective-counsel cases. First, unlike the Ninth Circuit's rigid approach, *Strickland's* test of "deficient performance" makes a contemporary assessment of "all the circumstances" of the case; in particular, the validity of "investigative decisions" take account of the "information supplied by the defendant" to his lawyer. 466 U.S. at 690-1. On the "performance" prong in this case, the Ninth Circuit insisted that "social history" and "medical" evidence be presented at the penalty phase of Jackson's trial, without regard to the individual circumstances confronting counsel. For example—after obtaining Jackson's school, employment, medical, military, and judicial records—defense counsel and his investigator interviewed petitioner, his mother, and his wife, and requested from petitioner himself and his mother, albeit unsuccessfully, the whereabouts of other Jackson family members. (App. B97-101.) Under *Strickland*, as properly concluded in other

Circuits, seeking "mitigation" in the petitioner's background from the petitioner and his mother and wife would have been enough under these circumstances. *Wiley v. Puckett*, 969 F.2d 86, 99 (5th Cir. 1992); *United States v. King*, 936 F.2d 477, 480 (10th Cir. 1991); *McCleskey v. Kemp*, 753 F.2d 877, 900-1 (11th Cir. 1991); see *United States v. Miller*, 907 F.2d 994, 998 (10th Cir. 1990) ("failure to investigate "cannot be charged as a claim of ineffective counsel when the essential and foundational information required to trigger such an investigation is withheld from the defendant's attorney by the defendant himself").

Outside the Ninth Circuit, similarly, the omission of the mental and physical exams identified only a decade later by Dr. Aniline would not be deemed "deficient performance"—at least under circumstances where, as here, counsel sought out the advice of medical experts and the experts never suggested the need for further inquiry. E.g., *Hill v. Moore*, 175 F.3d 915, 926 (11th Cir. 1999); *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1994). For to do so would be to charge the lawyer with the very expertise of the medical doctors themselves.

On the *Strickland* "prejudice" prong, likewise, this Court has rejected any notion that "prejudice" may be presumed from counsel's deficient performance itself, and has required the claimant to establish a "reasonable probability" of a different result. 466 U.S. at 691-3. Petitioner's burden of proving prejudice follows from the fact that it is an essential component of the constitutional claim itself, *Lockhart v. Fretwell*, 506 U.S. at 369 n. 2; without it, he cannot show the constitutional violation prerequisite to federal habeas relief, 28 U.S.C. § 2254; see *Johnson v. Zerbst*, 304 U.S. 458, 464, 469 (1937). It would be absurd if the rule were that, where a competent investigation shows no favorable evidence existed, the defendant must live with that fact, but that, if the investigation were incompetent, then the defendant would benefit from an assumption that favorable evidence actually existed. Under that regime, a defendant might be better off with an incompetent lawyer than

a competent one. Further, as this Court has explained in a closely-related context, a "reasonable probability" is more than a "reasonable possibility." *Strickler v. Green*, 527 U.S. at 291. A fortiori, the challenger must show more than a mere possibility that evidence powerful enough to meet the higher "probability" *Strickland* standard actually existed in the first place. Thus, unlike the Ninth Circuit in the case at bar, other circuit courts of appeals have insisted that, in an ineffective-counsel claim based on alleged omitted evidence, the convicted defendant must prove the evidence really would have been favorable to the defense. E.g., *McBride v. Sharpe*, 25 F.3d 962, 972-3 (11th Cir. 1994); *McAleese v. Mazurkiewicz*, 1 F.3d 159, 174-5 (3d Cir. 1993); *Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989); see *Coleman v. Brown*, 802 F.2d 1227, 1234 (10th Cir. 1986).

Contrary to those principles, the Ninth Circuit in this case merely assumed that Dr. Mead possibly could have rendered a favorable opinion on premeditation, and one not simply an "ipse dixit." Further, it assumed without proof that the various mental and physical tests identified belatedly by Dr. Aniline in fact would have been so favorable to the defense as to show the claimed "90% certainty" of unconsciousness. And it accepted as true, in the face of the unchallenged evidentiary ruling and in derogation of the State's right of cross-examination, unproven allegations contained in Jackson's family and "social history" declarations. In premising relief on such grounds, the panel majority's opinion conflicted with Sixth Amendment ineffective-counsel law as laid down by this Court and by other circuit courts of appeals.

D. The Ninth Circuit violated the anti-retroactivity doctrine of *Teague v. Lane*.

Even putting aside the question of whether *Strickland* requires the petitioner to prove up the evidence he says was

incompetently omitted at trial, and even putting aside the question of whether *Strickland* requires that certain kinds of evidence always must be presented at a capital sentencing hearing regardless of the individual circumstances confronting trial counsel in the case, certiorari should be granted because the Ninth Circuit's decision in this case improperly granted relief on what in effect was a "new" extension of Sixth Amendment law in this area. Such extensions of constitutional precedent to grant relief against final criminal judgments run afoul of this Court's anti-retroactivity doctrine, prohibiting the federal court from invoking reasonably debatable "new rules" of law to award habeas corpus relief to a State prisoners. See *Teague v. Lane*, 489 U.S. 288 (1989) (plur. op.); *O'Dell v. Netherland*, 521 U.S. 151 (1997).

In light of the cases cited above, it at least would have been "objectively reasonable," see *O'Dell*, at 156, for a State judge, back at the time of the finality of Jackson's conviction in 1990, to deny relief on Jackson's claim in the absence of proof that favorable mitigating evidence actually had been reasonably available to counsel, and that counsel under the circumstances had no reasonable basis to forgo it. Accordingly, federal relief in this case was not strictly "dictated" by precedent, and violated the habeas corpus anti-retroactivity doctrine. See *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997) (*Teague* question is whether the unlawfulness of [the] conviction was apparent to all reasonable jurists").

CONCLUSION

As explained above, the Ninth Circuit egregiously departed from regular procedure and grossly distorted this Court's *Strickland* rule. The petition for writ of certiorari, therefore, should be granted.

Dated: October 16, 2000.

Respectfully submitted.

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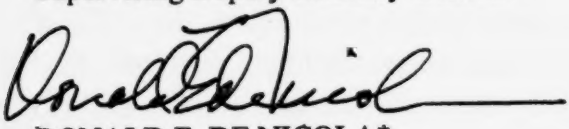

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